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NO. 96544-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THE CHURCH OF THE DIVINE EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent

RESPONSE TO PLAINTIFF'S AMENDED OPENING BRIEF

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I. STATEMENT OF FACTS

The Church of the Divine Earth (Church) submitted a request for records on June 12, 2017, asking for "Job performance evaluations, comments on job performance, documents showing salary each of the past 5 years for Peter Huffman and Kurtis Kingsolver." CP 297. On June 24, 2017, less than two weeks later, the City provided responsive documents. CP 295-96. Portions of the some of the responsive documents, the performance evaluations of Mr. Kingsolver and Mr. Huffman, had been redacted to remove the personal comments of the employees and of the supervisor performing the evaluations. CP 394- 51.

Along with the responsive documents, the City provided a privilege log that identified and explained the bases for redactions to the performance evaluations. CP 298.

The privilege log explained:

These records, consisting of performance evaluations which do not discuss specific instances of misconduct, are protected from disclosure and have been withheld in the entirety based on the following authority:

RCW 42.56.230 personal information

(3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

RCW 42.56.050 Invasion of privacy, when. A person's "right to privacy," "privacy," or "personal privacy," as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person:

(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specific in this chapter as

express exemptions from the public's right to inspect, examine, or copy public records. -AND- **Dawson v. Daly**, 120 Wn.2d 782,797 (1993).

CP 298 (emphasis in original).

On November 7, 2017, the Church filed its complaint in this lawsuit, alleging the City violated the Public Records Act by redacting portions of the performance evaluations. The Church also claimed that the City's use of a privilege log or index-type format for the brief explanations for the redactions was incorrect. The Church sought penalties, attorney fees, an injunction preventing the City from answering future requests in the same manner, and requested an *in camera* review of the redactions, and to thereafter order the City to provide unredacted copies of the performance evaluations. CP 245- 248.

The Church filed a motion for summary judgment and motion for *in camera* review. The City objected to summary judgment but agreed with the request for *in camera* review. At the hearing on the Church's motion for summary judgment on May 18, 2018, the Court, Hon. Kathryn Nelson, denied the plaintiff's motion for summary judgment but granted the plaintiff's request for an *in camera* review. CP 385- 86.

On June 29, 2018, Judge Nelson issued her decision on the *in camera* review. The Court ruled that the City's redactions were proper and that its brief explanations were sufficient. CP 391-92. The Court stated that "[t]here is nothing further that Defendant City of Tacoma must do with

respect to the substance of its privilege log, and all redactions reviewed in camera were appropriate.” CP 392.

The City therefore noted a motion for summary judgment for August 3, 2018, asking the Court to dismiss the case. CP 638- 656; 683-703. Before the motion was heard, the case was reassigned from Judge Nelson to Judge Spier. The City re-noted the summary judgment motion for September 7, 2018. When the parties appeared for the summary judgment hearing, the Church asked Judge Spier to disqualify herself, and the case was reassigned to the current judge, Hon. Grant Blinn.

Judge Blinn granted the City’s motion for summary judgment. CP 701- 03. Judge Blinn held that the City’s redactions were proper under the controlling authority of Dawson v. Daly and that the City’s privilege complied with the brief explanation requirement as interpreted by various reported cases.

II. ARGUMENT

A. The City properly claimed the exemption for performance evaluations because evaluations are considered personal information that an employee would find highly offensive if provided to the public.

The “PRA’s mandate for broad disclosure is not absolute.” Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 432, 300 P.3d 376 (2013). Exemptions have been created to “exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government.” Ameriquet Mortg. Co., v. Office of Attorney Gen., 177

Wn.2d 467, 486, 300 P.3d 799 (2013); see also Laws of 2007, ch. 198, §1 (“The legislature recognizes that public disclosure exemptions are enacted to meet objectives that are determined to be in the public interest.”).

When an agency withholds all or part of a document in response to a request for records, the agency bears the burden of demonstrating that a particular exemption applies. Prison Legal News, Inc. v. Dep’t of Corr., 154 Wn.2d 628, 636, 115 P.3d 316 (2005). Here, the City cited to two statutes and one Supreme Court case as the basis for redacting portions of the performance evaluations.

First, the City cited to RCW 42.56.050, one of the codified exemptions to disclosure of public records entitled “Invasion of privacy”.

The statute provides a two part test for application of this exemption:

A person’s “right to privacy,” “right of privacy,” “privacy,” or “personal privacy,” as these terms are used in this chapter, is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public’s right to inspect, examine, or copy public records.

RCW 42.56.050. The City also cited to RCW 42.56.230, which contains an exemption for “Personal information.” It provides:

The following personal information is exempt from public inspection and copying under this chapter: . . . (3) Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

RCW 42.56.230 thus refers back to the right to privacy recognized by RCW 42.56.050.

The Washington courts have held that employee performance evaluations fall within the ambit of RCW 42.56.050's invasion of privacy exemption. "Evaluations of public employees ordinarily are not subject to public disclosure" and are exempt under RCW 42.56.050. Spokane Research v. City of Spokane, 99 Wn. App.452, 456, 994 P.2d 267 (2000).

"Employee evaluations qualify as personal information that bears on the competence of the subject employee." Dawson v. Daly, 120 Wn.2d 782, 797, 845 P.2d 995 (1993), overruled in part on other grounds, Soter v. Cowles Pub., 162 Wn.2d 716, 174 P.3d 60 (2007)). The "sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be appropriate subject of judicial notice." Dawson, at 797 (quoting Detroit Edison Co., v. NLRB, 440 U. S. 301, 318, 59 L. Ed.2d 333, 99 S. Ct. 1123 (1979)). This "sensitivity goes beyond mere embarrassment, which alone is insufficient grounds for nondisclosure under [the PRA]." Dawson, at 797. Even favorable information about an employee that is contained in performance evaluations "is personal information and its release is an invasion of privacy." Celmins v. United States Dep't of Treasury, 457 F. Supp. 13, 15 (D.D.C. 1977). See also Smith v. Dep't of Labor, 798 F. Supp. 2d 274 (D.D.Ct. 2011) (Performance appraisals are exempt from production in a FOIA request).

The Church argues that Dawson defined “personal information” as the “intimate details of one’s personal and private life.” Brief at 4, citing Dawson, 120 Wn.2d at 796. But that is not correct. In Dawson, the Court indicated that when “[s]peaking generally about the right of privacy, we have stated that the right of privacy applies ‘only to the intimate details of one’s personal and private life,’ which we contrasted to actions taking place in public that were observed by 40 other people.” Dawson, at 796. The Dawson Court went on to state that it “has not previously been considered in this jurisdiction” whether performance evaluations are personal information entitled to a right of privacy Id. The Court identified other jurisdictions that have determined that performance evaluations are subject to a right of privacy, and the Dawson concluded, “We agree that employee evaluations contain personal information within the meaning of RCW 42.17.310(1)(b).” Thus, the Dawson court clearly declined to apply the limited definition of “personal information” quoted by the Church.

Performance evaluations not only contain the type of personal information contemplated by the exemption, it is the type of personal information that public employees would find highly offensive if it were disclosed. The Dawson court stated that “disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255 [recodified at RCW 42.56.050]”. Dawson, at 797. This presumption establishes the offensiveness prong, and it” may be overcome in some

cases” such as where identifying information may be removed such that an employee’s privacy is protected. Dawson, at 797.

Here, the Church made no effort to overcome the presumption but instead argues that the reasoning of the Dawson court in adopting the presumption makes no sense. Brief, at 6. However, the Dawson presumption is based on Detroit Edison Co. v. NLRB, 440 U.S. 301, 318, 59 L. Ed. 2d 333, 99 S. Ct. 1123 (1979), where the Supreme Court stated that the court can take judicial notice of the sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence.

The Church also argues that the trial court failed to explain how the phrase “performance of public duties” modifies the personal information analysis. The Church does not offer any suggested interpretation other than to say that with the performance evaluations “there is *nothing* but a discussion of public duties.” Brief, at 15. In other words, according to the Church, the phrase nullifies the personal privacy concern of public employees in their competence to perform their jobs because their jobs are solely for the purpose of the fulfillment of public duties. However, such an interpretation of the phrase “performance of public duties” swallows the entire exemption.

The phrase “performance of public duties” refers to the Dawson’s court quotation from Ollie v. Highland Sch. Dist. 203, 50 Wn. App. 639, 645, 749 P.2d 757, review denied, 110 Wn.2d 1040 (1988). In Ollie, the

plaintiff sought the “personnel evaluations and records of the performance and discipline of other employees which she could use to show disparate treatment and for impeachment.” Ollie, at 645. The school district declined to produce any part of the personnel record, which included much more than just the performance evaluations. On appeal, the appellate court held that “not all the information contained in personnel evaluations and personnel records of school district employees is privileged; information about public, on-duty job performances should be disclosed.” Id. In other words, the Ollie court used the phrase to distinguish non-confidential records in an employee’s personnel file from those records in the personnel file that are confidential. The phrase did not refer to the entirety of the employee’s file on the basis suggested by the Church, that a public employee’s entire work performance is in furtherance of public duties such that nothing in the file, including performance evaluations, is non-confidential.

Moreover, the phrase “public, on-duty job performances” is not at issue in our case because there are no records of “public, on-duty job performances” that were withheld or redacted. The only records at issue in our case are the confidential, one-on-one, performance evaluations done by an employee and his or her supervisor. Dawson, as well as the other two cases that deal specifically with the exemption for performance reviews of public employees, make clear that confidential, one-on-one performance evaluations that deal with an employee’s competence to do his or her job,

are generally exempt from disclosure. See, Spokane Research, 99 Wn. App.452 (2000); Brown, 71 Wn. App. 613(1994).

B. There is no legitimate or reasonable public concern that would justify the harm that be caused to government administration by releasing performance evaluations.

In analyzing performance evaluations, once the records are established as personal information the disclosure of which would be highly offensive, the exemption requires that there is an absence of a legitimate public concern in their disclosure. In this context, the term "legitimate" means "reasonable." Dawson, at 798. Thus, it is appropriate to balance the public interest in disclosure against the public interest in the efficient administration of government." Id. In balancing those interests, the courts have observed that "[e]valuations of public employees [are] of small public concern." Spokane Research, at 456.

On the other hand, disclosure of the evaluations could harm governmental function. It is not reasonable to require "disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure." Dawson, at 798. If agencies were required to disclose employee performance evaluations "employee morale would be seriously undermined," leading to a "reduction in the quality of performance by these employees." Id. at 799. In addition, "disclosure could cause even greater harm to the public by making supervisors reluctant to give candid evaluations." Id. Thus, in the absence of specific instances of misconduct, there is no reasonable or legitimate

public concern which might require the agency to disclose an employee performance evaluations. Id. at 799- 800. “[R]equiring disclosure where the public interest in efficient government could be harmed significantly more than the public would be served by disclosure is not reasonable. Therefore, in such a case, the public concern is not legitimate.” Id. at 798.

For example, the issue of disclosing performance evaluations was the focus in Brown v. Seattle Public School, 71 Wn. App. 613, 860 P.2d 1059 (1993), review denied, 123 Wn.2d 1031 (1994). In Brown, the requestor sought the personnel records of the school principal. The requestor in Brown made the same arguments that the Church makes in the instant case: that the PRA favors disclosure; that exemptions are to be narrowly construed; that the documents were not highly offensive; and that the records of the school's top administrator were of legitimate concern to the public. The trial court had ordered their production, but the appellate court reversed.

In holding that the performance evaluations should not be produced, the appellate court noted that public education needs effective evaluation systems of teachers and administrators. Brown, at 618-19. The District’s system would be “undermined if it is stripped of confidentiality.” Id. Citing Dawson, the Brown court explained that the harm to the evaluation system outweighs the public interest in disclosure. The court stated that “if disclosure of these evaluations is allowed the quality of public employee performance will suffer because employees will not receive the guidance

and constructive criticism required for them to improve performance and increase their efficiency.” Id. at 619-20.

The Brown court acknowledged that there was an argument to be made that there were concerns about the performance of the principal, because he was the school’s top administrator, but these concerns fell short of specific instances of misconduct. The Court stated that the “harm outweighs the public interest in disclosure in cases where a review reveals that the evaluations do not discuss specific instances of misconduct or public job performance.” Brown, at 619.

The only case in which the Washington courts have held that a performance evaluation of a public employee should be disclosed because of the weight of a legitimate public concern when balanced against privacy concerns is Spokane Research v. City of Spokane, 99 Wn. App. 452, 994 P.2d 267 (2000). In that case, the requestor sought the evaluation of the City Manager of Spokane, whose evaluation was done by an outside consulting firm with input from 125 citizen surveys. The Spokane Research court took great care to distinguish the position of City Manager from other city employees. The court reasoned that the City Manager is not like a regular public employee because the “City Manager is the City’s chief executive officer, its leader and a public figure.” Id. at 457. The performance of the City Manager is a legitimate subject of public debate. Id. Whereas most public employees reasonably expect that their evaluations will remain confidential, the City Manager has no such

expectation because the City Council's job is to discuss and decide in a public forum whether the employment of the City Manager should be continued. Id.

In our case, Mr. Huffman and Mr. Kingsolver are two of the City's 17 department heads. Their employment is not subject to City Council approval or evaluation, no outside consulting firm is retained for the evaluations, and no public comment on their performance is solicited or accepted during the evaluation process. As was described by Cathy Journey, the City's Training and Development Manager who oversaw the employee performance evaluation system, Mr. Huffman's and Mr. Kingsolver's performance evaluations were conducted just the same as every other City employee. CP 274; 376-77. As with other employees, each department head's evaluation is done confidentially, in a one-on-one meeting between the department head and his or her supervisor. CP 376-77. Like the school principal in Brown and the deputy prosecuting attorney in Dawson, Mr. Huffman and Mr. Kingsolver had confidential one-on-one sessions that they reasonably expected would remain confidential.

The Church argues that the Mr. Huffman and Mr. Kingsolver should be treated differently than other City employees because they are department heads that supervise hundreds of employees and have considerable discretionary authority over private citizens and performance evaluations are material to their continued employment. None of these propositions is supported by citation to factual evidence in the record. The

Church argues that there is a “legitimate public concern about the method whereby the City evaluates the performance of its department heads- also hidden by these redactions.” Brief, at 17. However, the redactions do not obscure the method by which each supervisor evaluates an employee, including these department heads. The method is clearly visible from the large sections of the performance evaluations that were not redacted.

As the Dawson and Brown courts acknowledged, there is always some public interest in the performance of governmental employees such as Mr. Huffman and Mr. Kingsolver. But that interest performance must be balanced against the “public interest in the ‘efficient administration of government.’” Dawson, at 798 (quoting RCW 42.17.255[recodified at 42.56.050]). In this case, the deposition and affidavit of Catherine Journey, the City’s Training and Development Manager, describe the governmental goals that are served by doing the evaluations and why confidentiality of the evaluations is essential to their effectiveness. The effectiveness of the evaluation relies, in part, on the ability of the supervisor and employee to be candid with each other. CP 376- 77. Making such evaluations public would seriously undermine the effectiveness of the evaluation process. Id. The trial court properly ruled that, in this case, the public interest in the evaluations was outweighed by the harm that disclosure of performance evaluations would cause to the evaluation process and to the efficient administration of government.

C. The City's brief explanations of the redactions complied with Washington law.

"When an agency responds to a request by refusing inspection of any public record in whole or in part, the response must include 'a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.'" Klinkert v. Wash. State Criminal Justice Training Comm'n, 185 Wn. App. 832,836,342 P.3d 1198 (2015), review denied, 183 Wn.2d 1019 (2015)(quoting RCW 42.56.210(3)). "The brief explanation can be in the form of a privilege log or withholding index and need not be elaborate but should allow a requestor 'to make threshold determination of whether the agency has properly invoked the exemption.'" Klinkert, at 836 (quoting WAC 44-14- 04004(4)(b)(ii) and Rental Hous. Ass'n., 165 Wn.2d 525, 539,199 P.3d 393 (2009)).The level of detail necessary for a requestor to determine whether an exemption is properly invoked will depend upon both the nature of the exemption and the nature of the document or information." City of Lakewood v. Koenig, 182 Wn.2d 87, 95, 343 P.3d 335 (2014). "The majority of exemptions are categorical and exempt 'without limit a particular type of information or record.'" Lakewood, at 95, quoting Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 434, 327 P.3d 600 (2013). "[W]hen it is clear on the face of the record what type of information has been redacted, and that type of information is categorically exempt, citing to the specific statutory provision may be sufficient

compliance with the requirement for a brief explanation." Lakewood, 1182 Wn.2d at 95. In other cases, more detail may need to be provided. Id.

In Lakewood, for example, the agency failed to give a sufficient brief explanation because it withheld driver's license numbers but did not cite to any exemption that specifically exempted driver's license numbers. Instead, the agency cited to general exemptions regarding privacy as well as other exemptions which did not seem to have any applicability and no explanation of applicability was provided by the agency. Lakewood, at 96. Therefore, the requestor could not make an initial evaluation of whether or not the agency properly invoked the exemption.

The Lakewood court pointed out that the circumstances in its case were similar to the brief explanation provided in Sanders v. State, 169 Wn.2d 827, 240 P.3d 120 (2010). There, the brief explanation was deemed, insufficient because the agency claimed the "controversy exemption" for numerous records but failed to identify which of several distinct controversies was being referenced. Lakewood, at 96-97, citing Sanders, at 846. Without that information, the requestor could not match up the redaction with a particular matter and was unable to make a threshold determination.

However, in our case, it is apparent what type of information has been redacted just by looking at the redacted records. CP 395-515. The descriptions of the types of information that was reacted are clear and

specific. Moreover, the City provided a privilege log that unmistakably identified the exemptions being claimed and why the exemptions applied.

The log went on to explain that no "specific instances of misconduct" had been redacted. The log also explained that RCW 42.56.230 protects the employees right to privacy and that RCW 42.56.0050 defines such privacy interests. The log then provided a pinpoint cite to Dawson v. Daly, 120 Wn.2d 782, 797 (1993) where the court stated, "We hold that disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255." The Dawson court then described why performance evaluations that do not contain specific instances of misconduct are not of sufficient legitimate concern to the public to risk the resulting detrimental effects of publishing such evaluations. Id. at 798. Thus, it is clear that the City provided a brief explanation that allowed the Church to make a threshold determination of whether or not the exemption was properly invoked.

The Church also complains that the format of the City's privilege log/withholding index was improper. However, the City's log complied with Washington law. WAC 44-14-04004(4)(b) provides:

Brief explanation of withholding. When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.56.210(3). The brief explanation should cite the statute the agency claims grants the exemption from disclosure. The brief explanation should provide enough information for a requestor to make a

threshold determination of whether the claimed exemption is proper.

* * *

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identify is exempt). The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency had properly invoked the exemption.

* * *

Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

Thus, the City's privilege log not only contained all of the required information but its format was specifically authorized by the Washington Administrative Code and cases interpreting the brief explanation requirement. See, Klinkert, at 836. Thus, when the superior court reviewed the privilege log, along with the redacted and unredacted records, in the context of the Church's motion for summary judgment and *in camera* review, Judge Nelson found that the City's brief explanations were sufficient. The Church is critical that Judge Blinn did not redo Judge Nelson's *in camera* review. However, the Church cites no authority for the proposition that a requestor is entitled to a second *in camera* review of documents.

D. Collateral estoppel does not apply.

Appellant also continues to assert that the brief explanations in this case are insufficient because a superior court judge found the City's brief

explanations insufficient in a different case filed over four years ago. Whether a brief explanation is sufficient is an inquiry that depends on the facts of each case. City of Lakewood v. Koenig, 182 Wn.2d 87, 95, 343 P.3d 335 (2014).

That prior case involved a different request, sought a different type of document (all records related to a building permit and subsequent hearing in front of the hearing examiner); for which the City claimed a different exemption (attorney client privilege and work product doctrine), for which the City provided different brief descriptions (identifying the attorney and date of the communication); which were authorized by different statutes. Moreover, the relevant case law was different in 2015 than it is today. See e.g., Klinkert v. Wash. State Criminal Justice Training Comm'n, 185 Wn. App. 832,836,342 P.3d 1198 (2015), review denied, 183 Wn.2d 1019 (2015).

Nevertheless, the Church asks this Court to apply collateral estoppel to prohibit the City from explaining why its brief explanations in this case comply with the law. Collateral estoppel requires an identify of issues. Shoemaker v. Bremerton, 109 Wn.2d 504,10, 507, 745 P.2d 858 (1987). Here, neither the facts nor the law relevant to the two cases are identical. Collateral estoppel also requires that application of the doctrine must not work an injustice on the party against who the doctrine is applied. Here, application of the doctrine would be unjust because it would prevent the City from explaining the redactions in this case and would limit the City to

the case law as it existed in 2015, before Klinkert and subsequent case were decided.

The Church argues that the superior court in that prior case penalized the City for using a withholding index similar to the index used here. However, that is not what the superior court's order states. The Church argues that testimony from Deputy City Attorney Martha Lantz establishes that the City has not changed its practice and is flagrantly defying the superior court judge who presided over that other case several years ago. Not only is the Church incorrect in its recitation of Ms. Lantz's testimony, the Church cites no legal basis for the proposition that a superior court order has the precedential authority ascribed by the Church.

There is no merit to the appellant's argument that because the City erred in the past it necessarily follows that the City erred now. In addition, the material facts do not support application of collateral estoppel. This court should rule that collateral estoppel is not appropriate in this case.

III. CONCLUSION

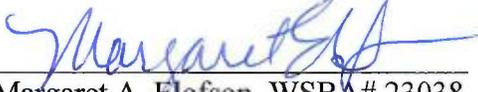
The City respectfully requests that the Court affirm the superior court's decision that the City properly applied the exemption for performance evaluations of public employees and that the City's brief explanations for the redactions complied with Washington law.

The City also request that it be granted its attorney fees and costs pursuant to RAP 18.1.

//

Dated this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2019, I filed, through my staff, the foregoing with the Clerk of the Supreme Court, for the State of Washington via electronic filing to the following:.

1. SUPREME COURT
2. Richard B. Sanders
Carolyn A. Lake
Goodstein Law Group, PLLC
510 South G Street
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EXECUTED this 5th day of June, 2019, at Tacoma, WA.



MARGARET ELOFSON

CITY OF TACOMA

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